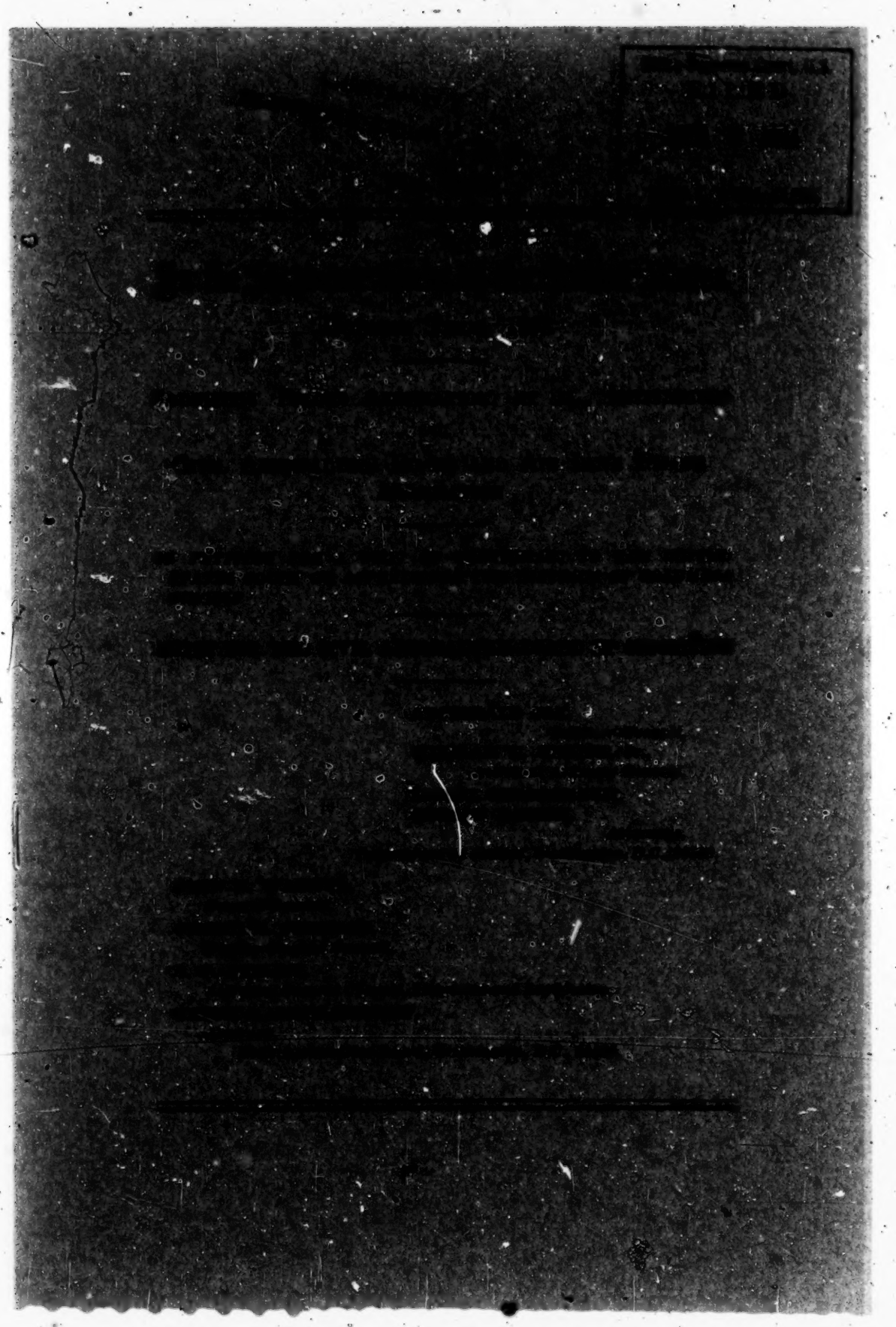

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	7
Conclusion	11

CITATIONS

Cases:	
Air Line Pilots Ass'n v. *Civil Aeronautics Board*, C.A.D.C., No. 17,149	4
Ford Motor Co. v. *Huffman*, 345 U.S. 330	8
Holman v. *Southern Airways, Inc.*, 210 F. Supp. 407	5, 9, 10
Humphrey v. *Moore*, 375 U.S. 335	8, 10
Mechling Barge Lines v. *United States*, 368 U.S. 324	7
National Labor Relations Board v. *Erie Resistor Corp.*, 373 U.S. 221	10
Southern Airways v. *Civil Aeronautics Board*, C.A. 5, No. 19,801	4
Statutes:	
Federal Aviation Act of 1958, as amended, 72 Stat. 731, 49 U.S.C. 1301 *et seq.*:	
Section 401(g), 49 U.S.C. 1371(g)	3
Section 401(k)(4), 49 U.S.C. 1371(k)(4)	2
Section 1002(c), 49 U.S.C. 1482(c)	2
Railway Labor Act, 44 Stat. 577, as amended, 49 Stat. 1189:	
Title I	2
Title II	2

722-382—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 743

SOUTHERN PILOTS ASSOCIATION, ET AL., PETITIONERS

v.

CIVIL AERONAUTICS BOARD AND AIR LINE PILOTS ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported in 323 F. 2d 288. The opinions and orders of the Civil Aeronautics Board (R. 101, 206, 223) are not yet reported.

JURISDICTION

The judgment below was entered on June 13, 1963 and a petition for rehearing was denied on October 14, 1963. The petition for a writ of certiorari was

filed on January 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

An order of the Civil Aeronautics Board directing an airline to resume bargaining in good faith with a pilots union and suggesting certain guidelines was followed by the agreement of the airline and the union upon a collective bargaining contract. The question presented is whether in these circumstances the court below properly dismissed a petition filed by certain nonunion pilots challenging the Board order, on the ground that their alleged injury flows from the bargaining agreement and any decision as to the validity of the Board order would have no effect.

STATEMENT

Title II of the Railway Labor Act (Pet., p. 32) requires air carriers to comply with the Title I requirement (Pet., p. 27) "to exert every reasonable effort to make and maintain agreements" with employee organizations concerning rates of pay, rules, and working conditions. Section 401(k)(4) of the Federal Aviation Act (Pet., p. 24) provides that it "shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with title II of the Railway Labor Act * * *", and Section 1002 (c) (Pet., p. 24) vests jurisdiction in the Board to issue an appropriate order to compel compliance "with any provision of this Act or any requirement established pursuant thereto * * *". Under these various provisions, the Board considers that it is empowered, in its sound discretion, to entertain complaints alleg-

ing violations by air carriers of the duty to conduct good faith labor negotiations; to determine whether there has been a violation; and, if so, to enter an order directing the carrier to bargain in good faith.[1]

In this case, Southern Airways and Air Line Pilots Association (ALPA), the duly certified bargaining representative of the Southern pilots, entered into negotiations concerning desired changes in an earlier labor agreement. After lengthy negotiation and unsuccessful attempts at mediation, the Southern pilots went on strike on June 5, 1960. Southern immediately began to hire replacement pilots and gradually resumed full operations. In the interim, mediation efforts continued, with the parties becoming deadlocked over the job retention rights and seniority status of the replacement pilots in relation to the striking pilots and Southern's right to discipline the striking pilots for misconduct during the strike. On the basis of a complaint by ALPA, and after full hearings, the Board found that Southern had improperly insisted that the returning strikers should have seniority only from the date of their return to work (with a consequent forfeiture of previously acquired seniority) and also demanded unjustifiably a right to discipline the returning pilots without regard to the grievance procedures provided by the Railway Labor Act (R. 113, 119–120). The Board directed

[1] Various criminal and civil sanctions are provided for failure to comply with a Board order. One such latter sanction (Section 401(g), Pet., p. 23) is revocation of the carrier's certificate for intentional failure to comply "with an order of the Board commanding obedience to the * * * condition [of the certificate] * * * found by the Board to have been violated. * * *"

Southern to resume negotiations (R. 134), and set forth in its opinion principles, derived from relevant judicial decisions, which were to be observed by Southern in order to constitute good faith bargaining (R. 131–132).[2] Insofar as is here pertinent, these were that Southern could retain as permanent employees the replacement pilots hired prior to July 12, 1960, the date on which the Board found that Southern's unlawful demands had created the impasse which led to the breakdown of negotiations, but that Southern should reinstate, with unimpaired seniority, all striking pilots not replaced prior to that date.

Both ALPA and Southern sought judicial review of the Board's order,[3] but Southern also reopened negotiations with ALPA (R. 204). Bargaining was resumed under the auspices of the National Mediation Board, and culminated in a new agreement on September 21, 1962 (see R. 219–223). That agreement provided for the withdrawal of the ALPA and Southern petitions for judicial review, the reemployment of the striking pilots, and the determination of the

---

[2] The Board stated (R. 132) that:

> In providing these guidelines we do not intend to preclude the parties from reaching an agreement which may differ therefrom. On the other hand, any substantial and unjustifiable deviation from these guidelines will, if persisted in, be taken into consideration in determining whether the requirement of good faith bargaining has been met.

[3] *Air Line Pilots Ass'n* v. *Civil Aeronautics Board*, C.A.D.C., No. 17,149; *Southern Airways* v. *Civil Aeronautics Board*, C.A. 5, No. 19,801, transferred to the District of Columbia Circuit because of the earlier filed ALPA petition and assigned No. 17,263.

seniority of all pilots from their date of hire. Since the returning pilots had been hired earlier than the replacement ones, the effect appears to have been that some of the replacement pilots serving as captains were reduced to copilots, and other replacements were furloughed to make room for the returning strikers.[4]

Shortly after the new agreement, the replacement pilots (the petitioners here) formed their association, and took various steps designed to preserve or obtain restoration of the positions which they had held with Southern. They filed in the court of appeals a petition for review of the Board's order directing a resumption of bargaining, and a petition with the Board seeking leave to intervene in its proceeding and requesting the Board to set aside its orders. Moreover, in November 1962 they brought suit in the District Court for the Northern District of Georgia against ALPA and Southern to enjoin them from putting the new collective bargaining agreement into effect.[5] The latter cause was dismissed on November 9, 1962 on the ground that the suit constituted an attack on the Board's orders (*Holman* v. *Southern Airways, Inc.*, 210 F. Supp. 407), and an appeal was taken to the

[4] The agreement provided that all replacement pilots hired prior to July 12, 1960 were to be retained in the employ of the company, and that the other replacement pilots were to be placed on a preferential hiring list (R. 221).

[5] Additionally, on October 9, 1962, they filed a petition with the National Mediation Board (File C-3322) requesting it to conduct an election of bargaining representatives in the hope that the replacement pilots' association would supplant ALPA as the bargaining representative with Southern.

Fifth Circuit. That case is apparently being held in abeyance pending the disposition of this litigation.

The Board dismissed the petition to it (R. 224), and petitioners amended their petition for judicial review to encompass this dismissal order as well as the earlier Board orders. In declining to act, the Board stated that it had retained jurisdiction in its proceeding only to insure that Southern bargained in good faith, rather than for the purpose of passing on the merits of any contract which might result from the further negotiations. It went on to find (R. 226) that "[t]here is no showing of any lack of good faith bargaining, and any altering or vacating of the Board's order would not in any way affect the contract over which we lack jurisdiction."

The court of appeals dismissed the amended petition for review on grounds of mootness, stating (Pet., p. 37):

> Petitioners allege that the Board order stands in the way of their attempt, in other courts, to enjoin operation of the bargaining agreement on the ground that the union, with the concurrence of the airline, discriminated against the replacement pilots. But the proceeding now before us is solely for review of the Board's order and a decision by this court on the validity of that order would have no effect because the rights and duties of the parties are now controlled by the bargaining agreement subsequently entered into. The Board, as it pointed out in its opinion denying petitioners' application for rehearing and intervention, has no jurisdiction to pass upon designations of bar-

gaining agents or charges of discrimination in the representation function.[9] Petitioners do not suggest otherwise.

[9] The Board stated: "* * * [T]he Board does not consider that it can look behind the National Mediation Board's designation of ALPA as the collective bargaining agent for [the airline's] pilots or inquire into whether the union had discriminated against petitioners in its representation functions. *Air Line Pilots Association* v. *Southern Airways, Inc.*, *supra*, Note. 4.

ARGUMENT

The decision below is correct and the petition presents no question of general importance warranting further review.

The Board found that Southern Airways, Inc. had violated its statutory duty to bargain in good faith by making certain demands in relation to the retention and seniority of replacement employees and by demanding non-reviewable disciplinary action against striking employees. After setting forth guidelines, the Board ordered Southern Airways to bargain in good faith with ALPA. Accepting the Board's mandate, Southern and ALPA proceeded with negotiations and ultimately entered into voluntary collective bargaining agreements. The rights of the parties are now controlled by the collective bargaining agreement, not the Board's order. Even if the order were to be set aside, the contract between Southern Airways and ALPA would remain in force and petitioners would still be subject to the seniority provisions to which they object. Accordingly, insofar as petitioners' particular claim of injury is concerned, the Board's order "is presently devoid of practical effect" (*Mechling Barge Lines* v. *United States*, 368 U.S. 324,

328 (1961)), and petitioners' attack upon it was properly dismissed by the court of appeals.

The terms of the contract were not dictated by the Board, but were voluntarily agreed upon by the parties. For, while the Board's order laid down certain "guidelines," these were not binding upon Southern and ALPA in the sense of foreclosing other arrangements. On the contrary, the Board made it clear that "In providing these guidelines we do not intend to preclude the parties from reaching an agreement which may differ therefrom" (R. 132).[6] And neither of the signatory parties claims that it was forced to enter into the agreement against its will.

Nor is there any foundation for petitioners' contention that the Board's order stands in the way of their efforts, in other courts, to enjoin the operation of the bargaining agreement itself on the ground that the ALPA discriminated against them in the exercise of

[6] Seniority is a matter of negotiation and contract. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338–339; *Humphrey* v. *Moore*, 375 U.S. 335. Southern's settlement here was entirely voluntary in the legal sense. The Board's order, entered on July 5, 1962, granted Southern a 30-day period within which to resume bargaining. Although filing a petition for review and a petition for stay of the order, Southern resumed bargaining on July 16, 1962, without awaiting action by the court of appeals on the petition for stay. That petition was never acted upon, presumably because of Southern's resumption of bargaining. The petition for review was dismissed as a part of the settlement agreement.

its representative function. As basis for that contention, petitioners cite *Holman* v. *Southern Airways, Inc.*, 210 F. Supp. 407 (N.D. Ga.), in which the district court dismissed their injunction suit for want of jurisdiction, deeming it a collateral attack upon the Board's order. Apparently, however, the complaint in that case was directed primarily to the Board's order, and only secondarily, if at all, to the bargaining agreement. Thus, the allegations of the complaint were summarized by the district court as follows (210 F. Supp. 407, 408):

> The plaintiffs assert in their petition that the orders of the Civil Aeronautics Board were made without their being given their day in court. The plaintiffs also assert, as the basis of their action, that the orders of the Board operated adversely and improperly upon their employment rights, and that the defendant Airline Pilots Association did not represent the plaintiffs but, in fact, acted to the detriment of the plaintiffs. The plaintiffs further allege that the orders of the Civil Aeronautics Board, which they are challenging herein, and the agreements made pursuant thereto, are contrary to contractual employment undertakings by defendant Southern Airways, Inc., with the respective individual plaintiffs.

Since jurisdiction to determine the validity of the Board's orders is vested exclusively in the court of appeals, the district court properly disclaimed

competence to deal with these allegations. But a court of appeals decision setting aside the Board's order is plainly not a prerequisite to challenging the validity of the contract.[7] To the extent the decision in *Holman* may have intimated the contrary, it can be corrected in the appeal now pending in the Fifth Circuit.

Petitioners' further assertion that they should be entitled to a decision on the merits because the Board's order retained jurisdiction over the proceeding and because the Board might act to preclude Southern from entering into any other agreement is unsound. The Board expressly stated (R. 226) that it "retained jurisdiction in this proceeding to insure that the carrier discharged its duty to bargain in good faith, and not for the purpose of passing on the merits of any contract which the parties might ultimately negotiate." Any additional Board action would arise only from a further complaint and finding of an unfair labor practice by Southern.

[7] We believe, however, that it will be difficult for petitioners to sustain on the merits their contention that it was discriminatory to accord all pilots seniority in accordance with their dates of hire, and that the replacement pilots were entitled to superseniority. See *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221; *Humphrey* v. *Moore*, 375 U.S. 335.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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